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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 273

THE MACCABEES and MODERN WOODMEN OF AMERICA,
Petitioners,

vs.

MRS. FLORENCE S. CARTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

and

BRIEF IN SUPPORT THEREOF.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, The Maccabees and Modern Woodmen of America, pray that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to

review a final judgment of that Court made and filed April 10, 1950, which affirmed the judgment of the United States District Court for the Middle District of Tennessee in favor of respondent.

The above cases were commenced in the Circuit Court of Davidson County, at Nashville, Tennessee and removed to the District Court on July 12, 1947 on account of the diversity of citizenship and the amounts involved.

They were consolidated and tried together in the District Court (R. 16). There was only one transcript of the record filed in the Court of Appeals and they were argued together in that Court.

A certified transcript of the record in the consolidated causes, including the proceedings in said Court of Appeals, is furnished herewith in compliance with Rule 38 of this Court.

JURISDICTIONAL STATEMENT.

It is insisted by petitioners that the Supreme Court has jurisdiction to review the judgment here in question under Title 28 United States Code, section 1254 (1).

Application for stay of execution of mandate was made to Judge John D. Martin of the Sixth Circuit Court of Appeals on June 9, 1950 for the purpose of filing petition for certiorari in this Honorable Court, which stay was granted "for a period of time including the 27th day of August, 1950," upon petitioners executing a good and solvent bond in the sum of Forty Three Thousand and no/100 ($43,000.00) Dollars, which was done.

SUMMARY STATEMENT OF MATTER INVOLVED.

The petitioner, The Maccabees, is a Fraternal Benefit Society, chartered and organized under the laws of the State of Michigan.

The petitioner, Modern Woodmen of America, is also a Fraternal Benefit Society, chartered and organized under the laws of Illinois.

Both were licensed to do business in Tennessee and were doing business in Tennessee at the time these suits were filed against them.

It was stipulated in writing in the District Court by the attorneys representing both the plaintiff and the defendants, and filed as a part of the record in the cause that the defendants are both Fraternal Benefit Societies and were qualified with the Commissioner of Insurance of the State of Tennessee to write Fraternal Benefit insurance in this State (R. 18).

From December 4, 1940 to March, 1945 The Maccabees had issued six (6) certificates on the life of one John T. Carter, a resident of Marshall County, Tennessee, in the total sum of Seventeen Thousand and no/100 ($17,000.00) Dollars. Two of these were sick and accident certificates and four of them were life certificates having double indemnity benefits.

On August 8, 1941, Modern Woodmen of America issued a certificate on his life in the sum of Five Thousand and no/100 ($5,000.00) Dollars. This certificate also had a double indemnity benefit provision. His wife (the respondent here), Mrs. Florence S. Carter, was named as beneficiary in each certificate.

(The parties will be referred to hereafter as they appeared in the District Court.)

On March 5, 1949, the complainant in each of the removed cases filed her complaint in the District Court in which she alleged that her husband, the said John T. Carter, on June 13, 1946 came to his death "through external violent and accidental means" by a pistol shot through the head (R. 3).

It was admitted in each complaint that the defendants had paid to her the face amounts of each life certificate but had not paid the face amounts of the two accident certificates. She sued each society on the five life certificates for

(1) double indemnity benefits

(2) 25% penalty and

(3) 6% interest.

She also sued The Maccabees for the face amounts of the accident policies, for 25% penalty and interest (R. 8 and 14).

She averred that the societies' refusal to pay the "double indemnity" demanded by her was in "bad faith" and that she was entitled to a statutory penalty.

The defendants filed separate answers in which they set up the following defenses:

(1) That the insured did not come to his death by accidental means, but that he committed suicide;

(2) That they were not in "bad faith" in their refusal to pay double indemnity as demanded by plaintiff;

(3) That the defendants are Fraternal Benefit Societies and, under the laws of the State of Tennessee, are not liable for penalties (R. 9 and 15).

From this record of 558 pages comprising the trial of this case before the Court and jury for four days (R. 550), it will be seen that the questions of "double indemnity" and of "bad faith in refusing to pay the amounts demanded by the complainant" were hotly contested. However, the jury found the issues in favor of the plaintiff (R. 32) and the Court entered judgments in her favor as follows:

Against The Maccabees in the sum of Thirty Thousand Seven Hundred Fifty-four and 17/100 ($30,754.17) Dollars, of which **Six Thousand One Hundred Fifty and 83/100 ($6,150.83) Dollars** was penalty and against Modern Woodmen of America in the sum of Six Thousand Nine Hundred Eighty-nine and 59/100 ($6,989.59) Dollars, of which **One Thousand Three Hundred Ninety-seven and 92/100 ($1,397.92) Dollars** was penalty (R. 51 and 52).

Motion for a new trial was made and overruled (R. 53). Appeal to the Court of Appeals for the Sixth Circuit (R. 65) affirmed April 10, 1950. Petition for rehearing denied May 29, 1950 (R. 591).

QUESTION PRESENTED.

The question presented in this petition for certiorari is,

Are Fraternal Benefit Societies in Tennessee Liable for Statutory Penalties?

This question arises out of the construction of Tennessee Code Sections 6360 and 6434 set out in the Appendix hereto.

We also set out there Code Sections 6357, 6358 and 6424, which are to be considered therewith.

(We shall hereafter refer to Code Sec. 6360 as "The Exemption Statute" and to Code Sec. 6434 as "The Penalty Statute".)

JUDGMENT OF THE COURT BELOW.

The opinion of the Court of Appeals in the instant case is not reported. The above cases were argued in the Court of Appeals on April 6, 1950 and on April 10, 1950 the Court entered the following order:

> "This case came on to be heard on the record and briefs and oral argument of counsel.
>
> "And it appearing that the verdict of the jury is supported by substantial evidence.
>
> "And it appearing that under Tennessee law fraternal benefit societies fall within the purview of and are governed by the provisions of Section 6434, Williams' Tennessee Code; Snyder v. Mystic Circle, 122 Tenn. 248, 268; Cf. Kidd v. National Council J. O. U. A. M., 137 Tenn. 398, 406.
>
> "And no reversible error appearing in the record,
>
> "It is ordered that the judgment of the District Court be, and it hereby is, affirmed.
>
> "Approved for Entry.
>
> s/ Florence S. Allen,
> Circuit Judge."

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Exercise of the discretionary power of this Court to grant the writ of certiorari herein prayed for is asked upon the following grounds:

1. **The Court of Appeals has rendered a decision in this case in conflict with the decision of another Circuit Court of Appeals on the same matter.**

The decision of the Court below is in conflict with the decision of the Court of Appeals for the Eighth Circuit in Railway Mail Assn. v. Chamberlin, 148 Fed. (2) 206.

2. **It has decided an important question of local law in conflict with an applicable local decision.**

It is in conflict with the decision of the Court of Appeals of the State of Tennessee in Brotherhood of Railroad Trainmen v. Daniels, 18 Tenn. App. 266, 75 S. W. (2) 1019.

3. **It has decided an important question of general law in a way untenable or in conflict with the weight of authority.**

4. **It has so far departed from the accepted and usual cause of judicial, or so far sanctioned such a departure by the lower Court as to call for an exercise of this Court's power of supervision.**

Title 28, U. S. Code, Sec. 1254 (1);
Supreme Court Rule 38, subdivision 5 (b).

We shall discuss these reasons or grounds in our Brief, which is attached hereto.

Wherefore, your petitioners respectfully pray that a **writ of certiorari** be issued out of and under the seal of

this Honorable Court, directed to the Court of Appeals for the Sixth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all proceedings in the case of The Maccabees and Modern Woodmen of America, Appellants-Defendants, against Mrs. Florence S. Carter, Appellee-Plaintiff, numbered 11,000 on its docket, and that said judgment of the Court of Appeals for the Sixth Circuit as to the infliction of 25 per cent penalty may be reversed by this Court and that your petitioners may have such other and further relief in the premises as to this Court may seem just; and your petitioners will ever pray.

THE MACCABEES and
MODERN WOODMEN OF AMERICA,
Petitioners,

By: McLANE & BATES,
WATKINS, MOORE & CROWNOVER,
Solicitors for Petitioners.

DAVID A. HERSH,
GEORGE G. PERRIN,
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Respondent.

BRIEF

In Support of Petition for a Writ of Certiorari.

JURISDICTION.

The facts supporting the jurisdiction of this Court are set forth in the petition.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(1) The decision of the Court below is in conflict with the decision of the Court of Appeals for the Eighth Circuit in Railway Mail Assn. v. Chamberlin (1945), 148 Fed. (2) 206, 10 C. C. H. 772, on the same matter which affirmed

a judgment of the U. S. District Court for the Eastern District of Arkansas.

Two questions were argued in the case:

First, was the defendant, the Railway Mail Association, a Fraternal Benefit Society as defined by the laws of Arkansas; and,

Second, if so, was it liable for statutory penalty for failure to pay the claim?

The Arkansas Exemption Statute is word for word with the Tennessee Exemption Statute, Code Sec. 6360 and is set out in the appendix.

It is Section 7857 of the Pope's Statutes of Arkansas, adopted in 1937 and is Section 66-1504 of the Code of Arkansas of 1947.

The plaintiff relied on Section 7670 of Pope's Arkansas Code of 1937 taken from the Statutes of Insurance and not from the separate statutes on Fraternal Benefit Societies, which section we include in the appendix hereto.

The District Court allowed a recovery for the face amount of the certificate of $4,000.00 but denied the penalty. It held that the defendant was a fraternal benefit society, and as such, that it was not liable for the penalty.

The Court of Appeals affirmed this decision.

The attorneys for the plaintiff contended in the Courts below that the decision of the Court of Appeals of the Eighth Circuit in the Chamberlin case is not authority here for the reason that Fraternal Benefit Societies are not mentioned in Section 7670 of the Arkansas Code and, therefore, came within the penalty provision.

The Supreme Court of Arkansas in the case of Galleghy v. American Insurance Co., 180 Ark. 4, 20 S. W. (2) 642,

held that Section 7670 does not apply to Fraternal Benefit Societies.

(2) The decision of the Court of Appeals in the instant case is in conflict with the decision of the Court of Appeals of the State of Tennessee in the case of Brotherhood of Railroad Trainmen v. Daniels (1934), 18 Tenn. App. 264, 75 S. W. (2) 1019.

It was held in that Court:

> **"It is conceded that the defendant is a fraternal benefit association or society operating upon the assessment plan, and its liability or non-liability must be determined by the common law and the Tennessee Statutes particularly applicable to it, and not by statutes applicable to life insurance companies."**

(All the emphasis [bold face type] in the Petition and Brief ours.)

(3) It has decided an important question of general law in a way untenable, or in conflict, with the weight of authority.

(4) It has so far departed from the accepted and usual cause of judicial, or so far sanctioned such a departure by the lower Court as to call for an exercise of this Court's power of supervision.

The decisions hereinafter cited under "Argument" apply to both "Reasons" 3 and 4.

So far as we can find, no opinion has been written by the Supreme Court of Tennessee in which it held that the "Exemption Statute", Code Sec. 6360, does or does not come "within the purview" of, and is governed by the provisions of the "Penalty Statute", Code Sec. 6434, but it denied the petiton for certiorari in the above mentioned

case of Brotherhood of Railroad Trainmen v. Daniels, and thereupon, set its approval upon said decision.

The decisions of the Court of Appeals of Tennessee are final in all civil cases within its jurisdiction (Code Sec. 10618) and can only be modified, changed or reversed by the Supreme Court on petition for certiorari (Code Sec. 10629).

> "The only mode by which the Supreme Court reviews a judgment or decree of the Court of Appeals is by writ of certiorari, and then only from a final judgment."
>
> Greenwood Bank v. Planters Bank, 158 Tenn. 50, 12 S. W. (2) 528.

BINDING DECISION.

Appellants insist that the decision of the Court of Appeals of Tennessee in the case of Brotherhood of R. R. Trainmen v. Daniels, supra, wherein the petition for certiorari was denied by the Supreme Court of Tennessee, is binding on the Federal Courts.

CONSTRUCTION AND INTERPRETATION OF LOCAL LAWS BY FEDERAL COURTS.

Since the case of Erie R. R. v. Tompkins, 304 U. S. 64, Federal Courts are committed to the doctrine that they must follow the statutes and decisions of the court of last resort of the state in which the action is pending, or whose laws are applicable to the issue.

In the case of West v. American Telephone & Telegraph Co., 311 U. S. 223, 132 A. L. R. 961, this Court held:

> "There are many rules of decision commonly accepted and acted upon by the bar and superior courts,

which are nevertheless laws of the State although the highest Court of the State has never passed upon them. In those circumstances a Federal Court is not free to reject the state rule merely because it has not received the sanction of the highest court of the state, even though it thinks the rule is unsound in principle or that another is preferable."

We beg leave to remark that the opinion of the Court of Appeals in the Daniels case **received the approval** of the Supreme Court of the State.

Following the Erie case, the Supreme Court has broadened the rule and held that if neither the courts of last resort nor intermediate courts of the state have passed upon the question raised by the pleadings, it is the duty of the Federal Court to look up other available data, and to determine for itself from such data, including related decisions not only in the state of the forum, but elsewhere, what, in the opinion of the Federal Court, the court of last resort of the state would decide.

West v. Tel. & Tel. Co., supra;
King v. United Commercial Travelers, 353 U. S. 153, 92 L. Ed. 608.

ARGUMENT.

We refer to the opinion of the Court below as set out on page 6 of the petition.

As to the second statement in the order that there is substantial evidence to support the verdict of the jury, we do not agree but since both the District Judge and the Court of Appeals find that there is, we shall not assign error on this ground, but we do positively deny the third statement **that Fraternal Benefit Societies in Tennessee fall within the purview of and are governed by Section 6434 of Williams' Code set out in the appendix hereto.**

Section 6360 of the Code, the "Exemption Statute," says positively that **"Fraternal Benefit Societies shall be governed by this article** and **shall be exempt from all provisions of the insurance laws of this state."**

The legislature having decided by what authority Fraternal Benefit Societies are to be governed, that question is not left open to the Courts.

LAWS OF STATES AS RULES OF DECISION.

> "The laws of the several states except where the Constitution treaties or statutes of the United States otherwise require or provide, shall be recognized as rules of decision in trials at common law in the courts of the United States, in cases where they apply."
>
> Sec. 725, U. S. C. A.;
> Erie R. R. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188.

When the legislature says that such societies **"shall be governed by this article"** it is referring to the article in which said Section 6360 is found, which is Article IX of

the Code of Tennessee adopted in 1931. This article as adopted consisted of Sections 6357 to 6433, inclusive, and, of course, the Penalty Statute was not among them.

Where the legislature said in said Section 6360 that **they shall be exempt from all provisions of the insurance laws of this state,** it was referring to Chap. 6, Article I of the Code designated, "NON ASSESSMENT LIFE INSURANCE: GENERAL PROVISIONS" and to any Code provision which could be termed as an Insurance Law.

The "Penalty Statute," Code Sec. 6434, is an insurance law in a different article and is intended to govern only insurance companies of the non-assessment class.

The legislative reasons for separating Fraternal Benefit Societies from Non-assessment Life Insurance Companies or "Old Line Companies" will hereafter be pointed out.

AUTHORITIES NOT PERTINENT.

The Court of Appeals in its order cites the cases of Snyder v. Mystic Circle, 122 Tenn. 248, 268, and Kidd v. National Council J. O. U. A. M., 137 Tenn. 298, 406, as supporting the contention of complainant that Fraternal Benefit Societies are within the purview of the "Penalty Statute," Code Sec. 6434.

We shall discuss the Kidd case first.

A casual reading of that decision will show that this question now before the Court did not arise in that case. There the defendant Order refused to pay the claim on the ground that the certificate holder, W. A. Kidd, had become addicted to drink and died drunk in the police station in Nashville. On the facts of the case the Chancellor held with the complainant and allowed a recovery of the face amount of the certificate but refused the

penalty. He held that the facts developed at the hearing justified the defendant in making the contest in "good faith."

We quote from the opinion of the Supreme Court:

> "Defendant insurance company is not liable for the statutory penalty for refusing in good faith to pay a claim for which it was afterward found liable."

The "Exemption Statute," Code Sec. 6369, on which we here rely, was not cited, not even mentioned.

An examination of the Snyder case cited by the Court of Appeals is subject to the same criticism as the Kidd case.

No mention is made in the opinion by the Supreme Court of Tennessee of the Exemption Statute, Code Sec. 6360. No defense was interposed in that case that Fraternal Benefit Societies are not subject to penalties. The defense urged there that Chap. 141, Acts 1901, now Code Section 6434, imposing a penalty **"on insurance companies"** was void **as impairing the obligation of a contract.** The Supreme Court of Tennessee held said Act valid, and no defense being interposed that Fraternal Benefit Societies in Tennessee are not liable for penalties by virtue of the "Exemption Statute," Code Sec. 6360, the judgment of the Chancery Court was affirmed.

This Honorable Court removed that case to this Court by writ of error and specifically stated:

> "The sole Federal question for decision is whether the above-mentioned statute as applied, impaired the obligation of the contract in suit, and thus violated Article I, Sec. 10, of the Constitution of the United States."
>
> Mystic Circle v. Snyder, 227 U. S. 494, 57 L. Ed. 611.

Said Penalty Statute, Code Sec. 6434, is quoted in full by Judge Hughes, but no mention was made of the "Exemption Statute," Code Sec. 6360.

Judge Williams, the compiler of the 1932 Code, says that Code Sec. 6434 was applied to a Fraternal Benefit Society "without any question as to the application of the statute to such insurance companies." (See his comment on said Section 6434 and referring especially to said case of Snyder v. Mystic Circle.)

It was an obvious error of the counsel of the Mystic Circle in not calling the attention of the Courts to the Exemption Statute, which we now do.

NATURE OF FRATERNAL BENEFIT SOCIETIES.

There is a fundamental difference between Fraternal Benefit Societies and life insurance companies, which furnishes a sound basis for legislative classification into two different groups.

The rationale of the universal exemption to be found in practically all fraternal codes, including that of Tennessee, can best be shown by an explanation of the nature of a fraternal society, as such is defined by the statutes governing same, which, like the Exemption Statute, are uniform throughout the country.

We confine this discussion principally to the Statutes of Tennessee.

A Fraternal Benefit Society is a voluntary association **without capital stock**, organized and carried on solely for the mutual benefit of its members and their beneficiaries and **not for profit;** having a lodge system with ritualistic form of work and a representative form of government (Code Sec. 6361). It has a supreme governing or legislative body and subordinate lodges into which members are

elected and initiated in accordance with its constitutional laws, rules, regulations and prescribed ritualistic ceremonies which subordinate lodges are required to observe (Code Sec. 6358).

Every Fraternal Benefit Society organized or licensed under the Fraternal Benefit Statutes of Tennessee is a charitable and benevolent institution, and all of its funds are exempt from taxation (Code Sec. 6424).

By express enactment they are to be governed by the Fraternal Benefit Statutes of this State.

This is the statute about which the battle rages:

Sec. 6360, Code of Tennessee:

> **"To be governed by what law. Except as herein provided, such societies shall be governed by this article and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted, shall apply to them unless they be expressly designated therein."**

Insurance companies are organized for ordinary business purposes, for **profit,** for investment and for benefit of credit for the protection of a large business concern by insuring the principal officer of the business, as well as for the protection of the family, all of which is legitimate, praiseworthy and constitutes by far the great amount of insurance in this country.

BASIS FOR EXEMPTION STATUTE.

Article IX of the Tennessee Code comprising the Fraternal Benefit Statutes has been reviewed and discussed by the Tennessee Supreme Court in the case of Hamilton National Bank v. Sam Amster, in 134 Tenn. 537, 184 S. W. 5,

especially with reference to the government of the society (Code Sec. 6360) and the exemption of its funds from attachment or other process for the collection of a debt of the beneficiary. In that case, the Hamilton County National Bank attached by garnishment a fund in the hands of the Royal Arcanum, alleged to belong to Amster. The defendant relied upon the Fraternal Benefit Statutes for relief, especially Sec. 12 of Chap. 480 of the Acts of 1905 (now Sec. 6398 of the New Code). The bill of the Bank assailed the Act as unconstitutional and void. This brought the entire Act under review by the Supreme Court and especially the two Sections 6360 and 6398.

We quote briefly from that case:

> "We find in the latter part of Section 12 (now 6398) the legislative declaration that such associations as fall under the operation of the Act are charitable institutions (now 6424) and their lodge property and funds are by express words made exempt from taxation under the general revenue laws of the state." . . .
>
> "**This provision demonstrates the wide gulf in the legislative mind between such associations as the legislature intended to fall under the operation of this Act and ordinary life insurance companies.**" . . .
>
> "The General Assembly, in enacting the provisions of Section 12, understood that it was dealing with charitable associations, and, as already noted, expressly so declares in that section, and indeed this fact stands out on the face of the entire act. One illustration of it may be found in the definition of a **fraternal** beneficiary association in section 1 of the act, supplemented by sections 2 and 3. Another illustration is in section 4 (now Code Sec. 6360), which **cleaves a clear line between associations falling under the operation of the act** and '**all provisions of the insurance laws of this State, not only in governmental relations with the State, but for every other purpose,**' and this

section closes with the emphatic declaration, **'and no law hereafter passed shall apply to them (meaning fraternal benefit associations), unless they be expressly designated therein.'** ''

The following from the above opinion shows clearly the legislative and judicial attitude in Tennessee towards Fraternal Benefit Societies:

"What has been said suffices to show the class of fraternal beneficiary associations which the lawmakers intended to fall within the operation of this act. Now, it is manifest that many points of difference exist between the business of life insurance transacted by such associations and the business of life insurance conducted by ordinary life insurance companies. It is unnecessary to undertake to enumerate these points of difference. Perhaps the fundamental one is the motive which underlies each business. Charity is the underlying motive of the associations covered by the provisions of this act. Such an association enters into the business of life insurance to the end that it may dispense a charity. It has no capital stock, and does no business for profit. Its form of government and system of conducting its business are as stated supra. On the other hand, the underlying motive in the business of ordinary life insurance is not charity at all, but profit. It is moved to enter into the business of life insurance by a wholly different consideration. Our legislation prior to the act in question has recognized the difference. This court, and other courts of last resort, have long been in agreement upon the point that contracts of insurance are proper subjects of classification in matters of legislation. Such contracts are sufficiently distinctive in character to bear a classification separating them from other contracts; **and, more than this, they are sufficiently distinctive in character to bear a classification as between them-**

selves. Insurance Co. v. Whitaker, 112 Tenn (4 Cates), 155, and cases cited at page 173, 79 S. W. 119, 64 L. R. A. 451."

The Exemption Statute in Tennessee first appears in Chap. 480, Acts of 1905. It was amended from time to time but now appears in the new Code as Sec. 6360.

The Penalty Statute which now appears as our Code Sec. 6434 in a separate article from both fraternal and life insurance statutes was first enacted by Chap. 141, Acts of 1901.

DUAL NATURE OF FRATERNAL BENEFIT SOCIETIES.

Many courts have recognized the dual nature of a Fraternal Benefit Society, which is well expressed by the Court in Haynes v. Fraternal Aid Union, 34 Fed. (2) 305, as follows:

> "But we are not dealing with an ordinary contract of insurance made by an ordinary life insurance company; we are dealing here with a class of insurance in which the policyholders are both the insurer and the insured."

The latest judicial expression of the Supreme Court of the United States, dealing with the character of a Fraternal Benefit Society is to be found in the case of The Order of United Commercial Travelers of America v. Wolfe, 67 Sup. Ct. Reporter 1355, 91 L. Ed. 1245, in which the Court was considering a Fraternal Benefit Society domiciled in Ohio under a code governing Fraternal Benefit Societies which, so far as definitions, representative form of government and exemption sections is concerned, is identical to the statutes of Tennessee. The Court in that case was considering the application of the Full Faith and Credit Clause of the United States Constitution and

based its decision upon the nature of such a society, saying:

> "We rely upon the character of the membership application sued upon * * * as something created, regulated and subject to change through a fraternal and representative form of intracorporate government depending for its terms, continuity and unity upon public acts of Ohio creating and regulating fraternal benefit societies."

The Court cites Modern Woodmen v. Mixer, 267 U. S. 544, as follows:

> "The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law, is elaborated in Supreme Council R. A. v. Green, 237 U. S. 592, 59 L. Ed. 1089. The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation."

To subject Fraternal Benefit Societies to a penalty, the proponent of such a claim must find a statute in Tennessee passed since the Act of 1905 expressly designating them as being subject to the penalty.

This the plaintiff cannot do.

NO CONFLICT OF STATUTES, STATUTORY CONSTRUCTION.

There is no conflict between the Exemption Statute, Code 6360, and the Penalty Statute, Code 6434, in our opinion. However, if it should appear that there is a

conflict between the two sections, this eventuality is provided for by one of the early sections of the New Tennessee Code, same being Section No. 13, Vol. 1, page 351, and is as follows:

> "**Conflicts**:—If provisions of different chapters or articles of the Code appear to contravene each other, the provisions of each chapter or article shall prevail as to all matters and questions growing out of the subject matter of that chapter or article."

THE CODE OF TENNESSEE ONE ACT.

The Tennessee Code of 1932 is a comprehensive act of the General Assembly of Tennessee of 1931, and all sections take effect contemporaneously.

Woodroof v. City of Nashville, 183 Tenn. 488.

SPECIAL AND GENERAL STATUTES.

Article IX of the Code is a special act applying only to Fraternal Benefit Societies.

Article X is a general insurance law subjecting insurance companies doing business in the State to 25% penalties under certain conditions.

This special enactment (Code Sec. 6360) prevails over the general statute, the Penalty Statute (Code Sec. 6434).

> "Where there are two acts or provisions one of which is special and particular and certainly includes the matter in question and the other general, which if standing alone would include the same matter and thus conflict with the special act or provision, the special act must be taken as intended to constitute an exception to the general act or provision, especially

when such general and special acts or provisions are contemporaneous, as the legislature is not to be presumed to have intended a conflict."

State of Tenn. v. Safley, 172 Tenn. 389, 112 S. W. (2) 831;

Rodgers v. United States, 185 U. S. 83, 46 L. Ed. 816.

"Where there is a general provision applicable to a multitude of subjects and also a provision which is particular and applicable to one of these subjects and inconsistent with the general provisions, it does not necessarily follow that they are so inconsistent that they both cannot stand.

"The **special provision will be deemed an exception** and the general provision will be construed to operate on all the subjects introduced therein except the particular one which is the subject of the special provision."

Board of Park Commissioners v. City of Nashville, 134 Tenn. 612, 185 S. W. 694.

"The reason and philosophy of the rule is that, when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions unless it is absolutely necessary to give the latter act such a construction in order that its words shall have any meaning at all."

Sedgwick on Constitutional Law and Statutory Construction, page 98.

We insist that the well-known rule of statutory construction applies here:

"Statutes will be construed so as to permit all to stand if possible."

Starkey v. Nixon, 151 Tenn. 637, 220 S. W. 980.

It is the insistence of the Petitioners that the Penalty Statute and the Exemption Statute can be construed so as to let both stand. The construction of the Penalty Statute, as insisted upon by the attorneys for the Respondent, strikes down Section 6360, the Exemption Statute relied upon by the Petitioners.

When the legislature passed the Penalty Statute 6434, it cannot be presumed that it forgot the previous Section 6360, exempting "benefit societies from all provisions of the insurance laws of this state," passed in the same breath.

The only logical conclusion to draw is that the legislature did not intend to inflict penalties on Fraternal Benefit Societies, which it classified in Code 6424 as charitable organizations.

If Code Sec. 6360 means what it says—"that no law hereinafter enacted shall apply to them unless they are expressly designated therein," the Courts are bound to give it effect, and it does not conflict with the "Penalty Statute" for the reason that Fraternal Benefit Societies are not mentioned in the Penalty Statute.

The two statutes can be reconciled by allowing each to operate in its own field as provided by Code Sec. 13 and by applying the reasonable rules of construction that:

(1) The legislature did not intend to pass conflicting statutes; and,

(2) A **special statute** controls a **general provision** in another statute, relating to the same subject.

State v. Safley, supra;
Woodroof v. City of Nashville, 183 Tenn. 483, 192 S. W. (2) 1013.

"Fraternal Benefit Societies are generally governed by special statutes and are, therefore, not considered to be governed by the general insurance laws."

Sec. 10143, Appleman on Insurance;
38 Amer. Jur., Sec. 128, "Mutual Ben. Societies."

In addition to the case of National Bank v. Amster, 134 Tenn. 544, construing the Tennessee Fraternal statutes, and especially the Exemption Statute, Sec. 6360, we have the recent case of Brotherhood of Railroad Trainmen v. Daniels, ... Tenn. App. 266, 75 S. W. (2) 1019, heretofore cited under "Jurisdiction."

REFERENCE BY NAME.

The attorneys for the plaintiff Mrs. Carter in the District Court and in the Court of Appeals, laid much stress on the following words from the Penalty Statute: "**and other persons doing business in this State**"; and, we presume they will do the same in this Court.

There is nothing in the Tennessee statutes to prevent an individual from **doing an insurance business** in this State.

Defendants insist that the attorneys for plaintiff erroneously interpreted said Penalty Statute, Code Sec. 6434.

The Exemption Statute, Code Sec. 6360, provides:

". . . no law hereinafter enacted shall apply to them **unless they be expressly designated therein.**"

The legislature of Tennessee has observed this provision of the Exemption Statute since it was enacted in 1905. In some instances it has placed burdens upon Fraternal Benefit Societies; and in some it has relieved them of burdens imposed upon other companies, but in every instance the subsequent statute has expressly designated them by name—Fraternal Benefit Societies.

By Code Section 6436 (Sec. 1, Chap. 443, Acts 1907), the legislature made it a misdemeanor for,

> "Any insurance company or association **including** Fraternal Benefit Societies"

to contribute to any political party.

They were designated by name in Chap. 3 of the Acts of 1945 (Code Sup., Sec. 1248.175), where they were expressly relieved of the payment of the two (2%) per cent. tax on gross premiums paid by other companies doing business in the State.

(The pertinent portions of said Act are set out in the Appendix.)

THE CASE OF TOBIN, COMMISSIONER OF INSURANCE V. ESTES.

The attorneys for the plaintiff in the Courts below laid much stress on the above case reported in 168 Tenn. 403. They insisted that Fraternal Benefit Societies were not mentioned in the Privilege Tax Act of the State, but that under the designation of "Insurance Companies" they were included and required to pay a privilege tax on each agent soliciting business for them. The Supreme Court expressly held that it did not apply to the Fraternal Benefit Society, but only to the agent.

This case sustains the position of the defendants. If the legislature of 1931 had intended to require the corporation to pay privilege taxes, it would have said so.

DECISIONS OF OTHER STATES ON PENALTY STATUTE.

In considering other data available to assist the Court in deciding, if necessary, what the holding of the Tennessee Supreme Court would be on this question, decisions of the Courts of other states in construing this Exemption Statute, 6360, are helpful and persuasive.

Arkansas:

"The Arkansas Statute Pope's Digest, Sec. 7857 provides that Fraternal Benefit Societies shall be exempt from all provisions of insurance laws of the State, not only in governmental relations with the State but for every other purpose and that no law enacted shall apply to them unless they be expressly designated therein. **We, therefore, hold, applicant being a fraternal benefit society that appellee was not entitled to recover a penalty or attorneys' fee.**"

Sovereign Camp W. of W. v. Mays, 195 Ark. 876, 115 S. W. (2) 851;

Knights of Maccabees v. Anderson (1912), 104 Ark. 417, 148 S. W. 1016.

Georgia:

"Georgia Code, Sec. 56-1704 (2869)—What Law Governs: Operation of insurance laws—such orders or associations shall be governed by this chapter and shall be exempt from the provisions of the insurance laws of this state; and no law hereafter passed shall apply to fraternal beneficiary orders or associations unless it expressly so provides."

The provisions of the Georgia penalty statute (Civil Code 1910, Sec. 2549) were held inapplicable to Fraternal Benefit Societies as defined in Civil Code, Sec. 2866 et seq.

(56-1701 Code 1933) in Brown v. Travelers' Protective Asso. (1932), 45 Ga. App. 410, 165 S. E. 143, the Court pointing out the statute imposing said penalties was enacted many years before enactment of the statutes authorizing the establishment of Fraternal Benefit Orders and hence that the legislature could not have intended to include such orders or societies within its terms; moreover, that Civil Code, Sec. 2869, expressly provided that such societies should be exempt from the provisions of the insurance laws of the State.

Missouri:

The Missouri Exemption Statute is the same as the Tennessee Statute and in the following cases, the penalty sued for was denied on the ground that by said statute they were exempt from penalties:

Olsen v. Supreme Council R. A. (1920), 205 Mo. App. 255, ... S. W. 966;

Morrow v. Nat'l Life Ass'n, 184 Mo. App. 308, 168 S. W. 881.

Texas:

"So, a Texas Statute (Rev. Stat. 1911, art. 4746) pertaining to life, health, and accident insurance companies, and providing for a penalty and attorneys' fees, was held inapplicable to a 'fraternal benefit society' in view of Vernon's Sayles' Anno. Civ. Stat. 1914, art. 4823, providing with respect to such societies: 'Except as herein provided, such societies shall be governed by this act, and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein', in Sovereign Camp W. O. W. v. Downer (1922), Texas Civ. App., 241 S. W. 229."

Nebraska:

Section 3212 R. S. 1913, is so far controlled by **Section 3299 R. S. 1913** (The Exemption Statute) as to preclude the Court from taxing, as part of the costs, an attorney fee in a suit based upon a certificate of membership in a Fraternal Benefit Society.

Masters v. M. W. of A., 169 N. W. 1.

STRICT CONSTRUCTION.

Code Section 6434, being a Penalty Statute, must be strictly construed.

Ins. Co. v. Kirkpatrick, 129 Tenn. 55, 166 S. W. 1186;
DeRossett Hat Co. v. London Ins. Co., 134 Tenn. 199, 183 S. W. 720.

GENERAL OBSERVATIONS.

A research of considerable of the literature surrounding statutory regulations of Fraternal Benefit Societies, and particularly the exemption section, which is found in the fraternal code in every state, including a run-down of all authorities through the West Digest System, fails to reveal a single case involving a duly licensed Fraternal Benefit Society where the Court refused to give full force and effect to the Exemption Statute. The only exceptions found were those in which the legislature had amended or reenacted laws governing insurance companies in general and had specifically designated Fraternal Benefit Societies therein.

As these petitioners are doing business in practically every State in the Union, the decision of the Court of Appeals in the instant case is of vast importance to them.

They insist that there is a conflict with the decision of another Court of Appeals on the same subject which affects them:

That there is a conflict with a decision of the Court of Appeals of the State of Tennessee on the same subject;

That the Court of Appeals has decided an important question of general law in conflict with the weight of authority in the United States and so far departed from the accepted and usual course of judicial decision as to call for an exercise of this Court's power of supervision.

CONCLUSION.

For the foregoing reasons, it is submitted that the petition for certiorari should be allowed and that the aforesaid judgment of the Court of Appeals for the Sixth Circuit in the instant case should be reviewed and modified and the statutory penalties denied.

Respectfully submitted,

THE MACCABEES and
MODERN WOODMEN OF AMERICA,
Petitioners,

By: McLANE & BATES,
WATKINS, MOORE & CROWNOVER,
Solicitors for Petitioners.

DAVID A. HERSH,
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APPENDIX.

Sec. 6357: Code of Tennessee:

"**Definition of a Fraternal Benefit Society.** Any corporation, society, order, or voluntary association without capital stock, organized and carried on solely for the mutual benefit of the members and their beneficiaries and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with section 6361, is declared to be a 'Fraternal Benefit Society' (1921, ch. 172, sec. 1)."

Sec. 6358: Code of Tennessee:

"**Societies Deemed to Be Operating Under Lodge System.** Any society having a supreme governing or legislative body and subordinate lodges or branches by whatever name known, into which members shall be elected, initiated, and admitted in accordance with its constitution, laws, rules, regulations, and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by the laws of such society to hold regular or stated meetings at least once each month, shall be deemed to be operating on the lodge system (Ib. sec. 2)."

Sec. 6360: Code of Tennessee, and Sec. 66-1504 Ark. (Exemption Statute):

"**To Be Governed by What Law. Except as herein provided, such societies shall be governed by this article and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose,**